No. 06-1584

In The
Supreme Court of the United States

JOSE F. MARTINEZ CUADRA,

Petitioner,

v.

ALBERTO GONZALES and
DEPARTMENT OF HOMELAND SECURITY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Dated: May 2007

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QUESTION PRESENTED

Whether prior counsel's conduct at the trial level was so egregious and incompetent as to arise to the level of ineffective assistance of counsel, thus qualifying as a violation of Petitioner's due process rights, such that his hearing should be reopened.

PARTIES TO THE PROCEEDINGS

Petitioner Jose F. Martinez Cuadra was also the Petitioner in the court of appeals, and Respondent Alberto Gonzales, Attorney General and Department of Homeland Security was the respondent below.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Statutory and Regulatory Provisions Involved	1
Statement	2
Reasons for Granting the Petition	11
1. The Court of Appeals failed to apply the abuse of discretion standard properly to this case	12
2. Mr. Martinez was denied due process by the unscrupulous actions of his legal representative and the failure of the appeal courts to recognize this fact	14
Conclusion	16
Appendix	App. 1

TABLE OF AUTHORITIES

Page

CASES:

Abassi v. INS
143 F.3d 513 (9th Cir. 1998) 10

Castillo-Perez v. INS
212 F.3d 518 (9th Cir. 2000) 8

Getachew v. INS
25 F.3d 841 (9th Cir. 1994) 9

Iturribarria v. INS
321 F.3d 889 (9th Cir. 2003) 11, 14

Lopez v. INS
775 F.2d 1015 (9th Cir. 1985) 6, 9, 14

Ontiveras-Lopez v. INS
213 F.3d 1121 (9th Cir. 2000) 4, 12

Ortriz v. INS
179 F.3d 1148 (9th Cir. 1999) 8

Paul v. INS
521 F.2d 194 (5th Cir. 1975) 6

Watkins v. INS
63 F.3d 844 (9th Cir. 1995) 12

AGENCY DECISION:

In Re Gadda
231 I&N Dec. 645 (BIA 2003) 13

STATUTES AND REGULATIONS:

Immigration and Nationality Act, 8 U.S.C. § 1101 et seq.:
§ 101(a)(3), 8 U.S.C. § 1101(a)(3) 2
§ 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) 2

TABLE OF AUTHORITIES – Continued

Page

Immigration and Nationality Act, 8 U.S.C. § 1158
§ 208(B)(1), 8 U.S.C. § 1158(b)(1) 2

Immigration and Nationality Act, 8 U.S.C. § 1229
§ 240(A)(b), 8 U.S.C. § 1229(b) 1, 2, 9, 14

Immigration and Nationality Act, 8 U.S.C. § 1229
§ 240(B), 8 U.S.C. § 1229c 2

PETITION FOR A WRIT OF CERTIORARI

Jose F. Martinez Cuadra ("Mr. Martinez"), through his undersigned counsel, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The immigration judge's decision denying Mr. Martinez's application for cancellation of removal and granting voluntary departure App. 10-17, *infra*, is unpublished. The decision of the Board of Immigration Appeals (hereinafter, BIA) reissuing the dismissal of his motion to reopen his case App. 3, *infra,* is unpublished. The memorandum opinion of the court of appeals denying both of Mr. Martinez's petitions for review, App. 1-2 and App. 6-7, *infra,* are unpublished.

JURISDICTION

The opinion of the court of appeals was filed on February 27, 2007. App. 1-2, *infra.* This Court has jurisdiction to review the court of appeals' opinion pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 240(A)(b) of the Immigration and Nationality Act (hereinafter, INA) [8 U.S.C. § 1229(b)] authorizes the Attorney General, in his discretion, to grant cancellation of

removal to an alien in the United States illegally. App. 19, *infra.* Section 101(a)(3) [8 U.S.C. § 1101(a)(3)] sets out the statutory definition of "alien." App. 18, *infra.* Section 208(B)(1) [8 U.S.C. § 1158(b)(1)] of the INA authorizes the Attorney General, in his discretion, to grant asylum to a "refugee." App. 18-19, *infra.* Section 101(a)(42)(A) of the INA [8 U.S.C. § (a)(42)(A)] sets out the statutory definition of "refugee." App. 18, *infra.*

STATEMENT

On October 15, 1996, the Petitioner filed an application for political asylum with the former Immigration and Naturalization Service. This application was referred to the Immigration Court and a Notice to Appear (hereinafter, NTA) was filed on August 14, 1997. At a Master Hearing on September 2, 1997, Petitioner admitted the factual allegations contained in the NTA and asked for the relief of political asylum under INA § 208 and in the alternative voluntary departure under INA § 240(B). Petitioner's counsel at that time, shyster Miguel Gadda, stated to the Court that Petitioner was ineligible to apply for Cancellation of Removal because he lacked a qualifying relative. (Miguel Gadda has since been disbarred from the practice of law in the State of California, and has been suspended from appearing before the Immigration Court).

On February 12, 1998 Petitioner nonetheless filed an application for cancellation of removal under § 240(A)(b) of the INA. On October 28, 1998, Petitioner appeared in Court with his counsel, Miguel Gadda. Petitioner's application for political asylum was withdrawn. Due to alleged contradictions in testimony of Petitioner and his witness,

the Immigration Judge (hereinafter, IJ) did not give full weight to either's testimony. The IJ found that Petitioner had not proved his physical presence for ten years and had not shown unusual and extraordinary hardship to a qualifying relative, in this case Petitioner's father. At the end of the hearing the IJ denied Petitioner's application for cancellation of removal and granted voluntary departure for a period of sixty days.

An appeal was filed to the Board of Immigration Appeals (hereinafter, BIA) by counsel Gadda on November 27, 1998. The Board issued a decision on December 9, 2002. However, in the interim, Gadda had been disbarred and suspended. In a footnote, the BIA wrote,

> 'We note that Miguel Gadda has been suspended from practice before the Board, the Immigration Judges, and the Immigration and Naturalization Service. As this attorney is not permitted to practice law before the Board at this time, this order is being sent directly to the respondent, and a copy is being sent to Miguel Gadda. Please also see the attached order suspending Miguel Gadda from practice.'

Unfortunately, Petitioner had moved, and never received the Board's decision. He was subsequently detained for removal by the INS, and when present counsel learned of his imminent removal, an emergency Petition for Review was filed with this Court, accompanied by a motion for an emergency Stay of Removal, which was granted. Simultaneously, present counsel filed a Motion to Reopen with the Board, based upon ineffective assistance of counsel, on January 7, 2003. On September 29, 2003 the BIA issued an order denying the Motion to Reopen, but Petitioner's counsel was not served.

On January 16, 2004, this Court issued a Memorandum granting the government's Motion for Summary Disposition in Petitioner's Petition for Review, citing *Ontiveras-Lopez v. INS*, 213 F.3d 1121 (9th Cir. 2000) for the principle that Petitioner had not exhausted administrative remedies with the BIA. However, since Petitioner's counsel had not been aware that there had been a disposition in Petitioner's Motion to Reopen before the Board, Petitioner had not been able to bring it to this Court's attention that indeed the issue of ineffective assistance of counsel had been addressed in the Board's decision of September 29, 2003.

Petitioner hired Mr. Gadda to represent him in his removal hearing. He was assured by Gadda that he would be able to obtain residency. When Gadda asked for documents Petitioner supplied them. Gadda asked for proof of Petitioner's physical presence. Petitioner gave income taxes, W-2 forms, one lease, and proofs of employment. On the day of the hearing, at Gadda's request, Petitioner presented proof of his current employment and his earnings according to the Social Security Office. He also presented the permanent residency card of his father and other relatives.

At the beginning of the merits hearing on October 28, 1998, the IJ invited Gadda to make any necessary changes to Petitioner's application. The only change was the addition of Petitioner's father and his current workplace to the application. Gadda was under the false impression that Petitioner had a U.S. citizen child. It was not until testimony began that Gadda realized that Petitioner's only qualifying relative was his lawful permanent resident father. The IJ made special notice of this in her negative decision on Petitioner's case.

In order to qualify for cancellation, Petitioner must show exceptional and extremely unusual hardship to a qualifying relative; yet, no details of his father's illness were elucidated on direct examination. Gadda did not ask Petitioner to provide any medical documents to prove his father's condition. No medical documents were submitted on Petitioner's behalf by counsel.

Petitioner must show that he has resided in the United States for the ten years preceding the filing of the application. This is a statutory requirement for cancellation of removal. Petitioner submitted income tax records from 1983, 1985 and 1988-1995. Respondent also presented a printout from the Social Security office of his earnings from 1979-1996.

There are substantial differences between the income listed on the income tax and the Social Security printout. The income taxes consistently show more income for Petitioner. This is due to two factors: 1) income from some W-2's was not included and 2) unemployment compensation is not noted on the Social Security print out. Counsel for the Petitioner did not point out these significant differences to the Court. The Court found the Social Security print out determinative. Based upon her interpretation of Petitioner's income, the IJ found that Petitioner had only worked for part of the years needed for statutory residence.

During testimony, there were discrepancies between the testimony of Petitioner and that of his father. Gadda never prepared either witness for their appearance in court.

There was another witness available to the Court at the time of the hearing, Petitioner's wife. This witness was

excluded from the courtroom prior to the start of the hearing so she would be available to testify. Gadda was on notice that the IJ found the testimony of Petitioner and his father to be contradictory. There was testimony showing that the witness could have testified both to Petitioner's physical presence and his father's hardship. Gadda himself deliberated, on the record, about calling this most crucial of corroborating witnesses, and decided not to, thus acting against the best interests of his client.

Petitioner can demonstrate Ineffective Assistance of Counsel

"Ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment of the Constitution if the proceeding was so fundamentally unfair that the alien was prevented from presenting his case." (*Lopez v. INS*, 775 F.2d 1015, at 1017 (9th Cir. 1985), *citing Paul v. INS*, 521 F.2d 194, 198-99 (5th Cir. 1975)). In the instant case, Petitioner was represented by Miguel Gadda, a notorious shyster who has since been disbarred.

The BIA, in its order dismissing Petitioner's Motion to Reopen, completely missed the fact the one of the reasons why the IJ denied Petitioner's application for cancellation was that he had not proven the statutory requirement of physical presence for a period of at least ten years. The Board states:

> In his motion, the respondent alleges that his former counsel provided ineffective assistance. Specifically, he maintains that because his former counsel failed to submit the respondent's tax returns and documentary evidence regarding

> the respondent's father's health conditions, the respondent was denied cancellation of removal.

Petitioner was prevented, due to the incompetence and ineffective assistance of his attorney, from showing the statutory amount of physical presence in the U.S. necessary in order for a grant of cancellation. Nowhere does the Board's decision mention that underlying threshold issue. Instead, the Board's decision seems to only refer to discretionary issues, and the issue of the health of Petitioner's father, which goes to extreme hardship. But the IJ made an explicit finding to that effect that Petitioner had not shown the requisite period of continuous physical presence.

In light of the contradictions in the respondent's testimony regarding his own physical presence in the United States, his father's physical presence in the United States and his wife's physical presence in the United States, the Court cannot find that the respondent was physically present in the United States for the entire time period that he testified he was here. Because of the contradictions in testimony, and that the evidence in the record is ambiguous regarding his physical presence, the Court concludes that the respondent has perhaps exaggerated his physical presence in the United States in hopes of gaining the relief of cancellation of removal.

It is specifically because Gadda did not present evidence in his possession pertaining to Petitioner's physical presence, and because he did not present an important corroborating witness who was present and willing to testify (Petitioner's wife) that the IJ came to the conclusion that the record did not support Petitioner's continuous physical presence. Additionally, the conflicting

testimony which the IJ found to be contradictory was largely a result of Gadda's failure to even meet with Petitioner and his witnesses prior to the hearing in order to conduct the most minimal of preparation for the hearing.

Thus, Petitioner meets the standard that was cited by the Board, even though the Board failed to see that the impact of Gadda's incompetence was that the IJ found that Petitioner had not complied with one of the statutory requirements for cancellation, that of continuous presence. "Due process challenges to deportation proceedings require a showing of prejudice to succeed." *Castillo-Perez v. INS*, 212 F.3d 518, 527 (9th Cir. 2000). "Prejudice is found when the performance of counsel was so inadequate that it may have affected the outcome of the proceedings." *Ortriz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999). (AR 3). It clearly *did* affect the outcome of the proceedings that the IJ pronounced that Petitioner was not even statutorily eligible for the relief sought.

The record reveals that Gadda had not reviewed the case with Petitioner. He did not review the file prior to trial. This is clear because Gadda asked Petitioner about a U.S. citizen child at the hearing even though it was clear from the application that he had no such child. It is also shown in that Gadda did not correct the application when asked to do so by the Court.

Gadda did not present evidence that was supplied by Petitioner to prove his continuous physical presence in the U.S. Documentation was in the Court record that would have shown Petitioner earned substantially more income than the evidence relied on by the Judge at the hearing. Had counsel presented this evidence to the Court he could

have overcome the inference that Petitioner had only worked seasonally in the Untied States. "It does appear from the record that the respondent was in the United States some part of each of the year . . . And it is more likely that the respondent returned to Mexico several times, if not annually, and for whatever reason has declined to indicate this for the Court."

Nor did counsel advise Petitioner that he was required to prove the hardship to his father. Petitioner was never told to provide medical evidence of his father's health problems. At the hearing counsel asked only general questions regarding Petitioner's father's health. Even counsel was aware that hardship had not been shown.

Gadda only met with Petitioner briefly to prepare for the immigration hearing. He met with Petitioner no more that two times for roughly fifteen minutes each. This is not enough time to prepare for such a complex hearing.

Petitioner was so poorly represented that he was prevented from reasonably presenting his case. *Lopez*, supra, at 1017. The performance of counsel was so inadequate that Petitioner could not establish his eligibility for cancellation of removal both statutorily and discretionarily. This resulted in prejudice to Petitioner. This prejudice clearly affected the outcome of the hearing. *Getachew v. INS*, 25 F.3d 841, 845 (9th Cir. 1994). Without the income tax to prove his ten years physical presence, Petitioner could not prove his statutory eligibility under INA § 240(A)(b)(1)(A). Because he was never advised that he must show hardship to his father, Petitioner could not show his eligibility under INA § 240(A)(b)(1)(D). Petitioner was denied his Fifth Amendment rights and should be

granted a new hearing to allow him to adequately present his case.

Petitioner's Motion to Reopen fits the *Abassi* standard

Under *Abassi*, Petitioner must show 1) a probability of success on the merits and the possibility of irreparable harm, or 2) that serious legal questions are raised and the balance of hardships tips sharply in the Petitioner's favor. *Abassi v. INS*, 143 F.3d 513 (9th Cir. 1998). Here Petitioner has a probability of success on the merits. He has evidence proving his statutory eligibility for ten years of physical presence in this country. This evidence was available to, but not presented by his former attorney. His qualifying relative, his father, has serious physical health problems, a disc problem in his back and severe edema in his legs. Gadda never informed Petitioner that he had to present evidence of hardship to his father at his hearing.

If Petitioner is not allowed to reopen his case he will suffer irreparable harm. He will lose his right to present his case fully and properly. He will lose his chance to remain in the United States with his family and to become a lawful permanent resident. Because Gadda did not prepare Petitioner, did not present evidence of presence in his possession, and did not inform Petitioner of hardship evidence to prove his case, Petitioner's Fifth Amendment rights have been violated.

Petitioner's motion raises serious legal questions regarding ineffective assistance of counsel. That Petitioner was incompetently represented is clear from the administrative record and Petitioner's declaration. Former counsel

did not present evidence, inform Petitioner of the need for hardship evidence. Petitioner and his witness were not prepared for testimony. Former counsel is no longer entitled to practice in California or before the Immigration Court. These are serious questions of deprivation of Fifth Amendment rights.

REASONS FOR GRANTING THE PETITION

The court of appeals opinion is erroneous for two reasons. First, the court failed to properly apply the abuse of discretion standard to the denial of Mr. Martinez's Motion to Reopen by the BIA. *Iturribarria v. INS*, 321 F.3d 889 at 894, (9th Cir. 2003). Prior counsel for Petitioner failed to review the case file and was unaware of evidence that would have proved that Petitioner had lived in this country for the requisite ten years.

Additionally, prior counsel failed to notify Mr. Martinez that he needed to show exceptional and extremely unusual hardship to qualifying relatives in order to win his case. Although Mr. Martinez's father was his only qualifying relative and has many medical conditions that would cause him exceptional and extremely unusual hardship upon the deportation of Mr. Martinez, prior counsel failed to inform Petitioner of the need for documentation of these conditions. These failures prejudiced Mr. Martinez's case, because of these failures he was prevented from prima facie eligibility for cancellation of removal.

Secondly, the court of appeals failed to apply the proper standard of a due process claim. The proper standard is a *de novo* review of the legal question. The court of

appeals did not address this claim in its opinion of this case.

1. The Court of Appeals failed to apply the abuse of discretion standard properly to this case.

The appeal courts that reviewed Mr. Martinez's case failed to properly analyze and apply the abuse of discretion standard. When a denial is arbitrary, irrational or contrary to law abuse of discretion will be found. *Ontiveros-Lopez*, at 1124, supra quoting *Watkins v. INS*, 63 F.3d 844, 847 (9th Cir. 1995). Contrary to the BIA decision of September 29, 2003, Mr. Martinez did show prejudice. The BIA clearly was arbitrary in its decision. The tax returns in question were contained in the record. The prejudicial error was not failure to submit the returns as the BIA speculates but failure to know they were already in the record. In fact, prior counsel submitted other documents which undercut Mr. Martinez's case. Mr. Gadda submitted social security records which did not include all of Mr. Martinez's income. Mr. Gadda did this because he was so ill prepared for the hearing that he did not even know what documents had been submitted by his own office. Therefore the IJ decided he had not lived in the United States for the necessary ten years because the income was so low. In fact, had Mr. Gadda known of and informed the court of the existence of these records, Mr. Martinez would have been able to prove his residence for the necessary ten years.

The BIA in the September 29, 2003 decision stated that Mr. Martinez failed to proffer what evidence prior counsel failed to submit regarding the health conditions of his father. Had the BIA properly reviewed the brief, such a

proffer was made. The documents that were not submitted were medical evidence from the father's doctor detailing his poor health. Without medical evidence Mr. Martinez could not prove that his father had poor health. Testimony from Mr. Martinez and his father cannot and do not prove any health problem. In addition, without objective proof of his father's poor health Mr. Martinez could not show the necessary hardship to his father.

Mr. Martinez was prejudiced because he relied on a legal representative who was unscrupulous. In fact, the actions of Mr. Gadda were so egregious as to cause him to be disbarred by the BIA. *In re Gadda*, 231 I&N Dec. 645 (BIA 2003). There is no doubt that Mr. Gadda routinely took clients, promised to fully represent them and then failed to provide even basic legal guidance.

This shoddy and cursory review by the BIA is especially egregious because the BIA is the only appeal court with jurisdiction to determine if the factual decision by the IJ is proper. No other court in this country has jurisdiction to review the discretionary decision of the IJ. Yet, the BIA paid little attention and did only a cursory review of the case knowing that there was no other forum for review. The BIA's refusal to adhere to the highest standard as the last court of review is prejudicial in and of itself.

The IJ also failed to review the file and was also unaware of the existence of the income tax returns which would have shown enough income to prove that Mr. Martinez had lived in the United States for the necessary ten years. Although the IJ has a responsibility to review the record it is the job of the representative to present the case. Mr. Gadda failed to acknowledge and present to the

court evidence pertinent to prove prima facie eligibility for cancellation of removal.

The circuit court of appeals also failed to review or understand what happened to Mr. Martinez. In one sentence of analysis the court denied the petition for review. Although the court had the full record and supposedly knows the nature of the relief applied for it failed to recognize the nature of the conduct of Mr. Gadda. Mr. Gadda's performance was so poor that he failed to present evidence reaching the bare minimum needed to present a prima facie case. In addition, had he spoken to his client he would have been able to ask for the needed documents from Petitioner. It is the duty of the legal representative, not the client, to ask for the necessary documents. Mr. Gadda's unscrupulous behavior prevented Mr. Martinez from presenting his case.

2. Mr. Martinez was denied due process by the unscrupulous actions of his legal representative and the failure of the appeal courts to recognize this fact.

Ineffective assistance of counsel which is so unfair that the alien is prevented from presenting his or her case is a violation of due process under the Fifth Amendment. *Lopez v. INS*, at 1017, supra. Reliance on an unscrupulous legal representative has been found to be such. *Iturribarria v. INS*, supra. Under INA § 240(A)(b) the applicant must show ten years physical presence, good moral character and unusual and extremely unusual hardship to qualifying relatives. Mr. Martinez has only one qualifying relative, his father. Mr. Gadda failed to notify his client that he needed objective medical evidence of his father's poor health in order to prove the necessary hardship.

Testimony from non-medical persons such as Mr. Martinez and his father cannot prove any medical condition. Neither has the medical knowledge to prove that Mr. Martinez's father has any condition much less what specifically he suffers from. Without these medical documents Mr. Martinez could not reasonably present his case.

Although, Mr. Martinez provided Mr. Gadda with income tax returns showing an income that could support him for each of the necessary ten years, Mr. Gadda failed to bring them to the attention of the court. Worse, he called attention of the court to social security documents which under-represented Mr. Martinez's income. Because of the small income listed in these documents the IJ determined that Mr. Martinez must have been living outside of the United States for a large portion of the ten years he needed to prove his residency. The willful actions of his prior counsel in using inadequate evidence prevented him from reasonably presenting his case. In fact the actions of prior counsel undercut his ability to show statutory eligibility and caused him to be ordered removed from the United States.

CONCLUSION

For the reasons stated above, Mr. Martinez respectfully requests that the Court grant his petition for certiorari.

Dated: May 24, 2007

Respectfully submitted,

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2007 WL 628022

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE FRANCISCO MARTINEZ-CUADRA, Petitioner, v. ALBERTO R. GONZALES, Attorney General, Respondent.	No. 05-71795 Agency No. A75-250-682 MEMORANDUM* (Filed Feb. 27, 2007)

On Petition for Review of an Order
of the Board of Immigration Appeals

Submitted February 20, 2007**

Before: BEEZER, FERNANDEZ and McKEOWN, Circuit Judges.

Jose Francisco Martinez-Cuadra, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") order denying his motion to reopen removal proceedings. To the extent we have jurisdiction, it is conferred by 8 U.S.C. § 1252. We review the denial of a motion to reopen for abuse of discretion. *Iturribarria v.*

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

INS, 321 F.3d 889, 894 (9th Cir. 2003). We deny in part and dismiss in part the petition for review.

The BIA did not abuse its discretion in concluding that Martinez-Cuadra failed to demonstrate that he suffered prejudice as a result of alleged ineffective assistance of counsel. *See id.* at 889-900 (to establish a valid due process claim for ineffective assistance of counsel, an alien must show that she was prejudiced by the attorney's deficient performance). The BIA properly determined that Martinez-Cuadra failed to demonstrate how submission of additional tax returns and evidence regarding his father's illness would have affected the outcome of the proceedings. *See id.*

We lack jurisdiction to consider Martinez-Cuadra's contention that his prior counsel should have called his wife as a witness, because he failed to raise that issue before the BIA. *See Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) (holding that exhaustion of an alleged procedural error is mandatory and jurisdictional).

PETITION FOR REVIEW DENIED.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A75-250-682 – San Francisco Date: Mar. 1, 2005

In re: MARTINEZ-CUADRA, JOSE FRANCISCO*

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Dixon, Alison, Esquire

ON BEHALF OF DHS: Larry J. Gallagher

REISSUED DECISION

ORDER:

PER CURIAM. To correct a defect in the service of the Board's previous decision, the Board's order of September 29, 2003, in this matter is hereby vacated and the proceedings reinstated upon the Board's own motion. 8 C.F.R. § 1003.2(a). An order in the matter is hereby issued as of this date, incorporating by reference the text of the attached vacated order.

/s/ Frederick D. Hess
FOR THE BOARD

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A75-250-682 – San Francisco Date: Sep. 29, 2003

In re: JOSE FRANCISCO *MARTINEZ*-CUADRA

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Alison Dixon, Esquire

ON BEHALF OF DHS: Larry J. Gallagher,
Assistant District Counsel

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen our decision dated December 9, 2002. The motion is denied. In his motion, the respondent alleges that his former counsel provided ineffective assistance. Specifically, he maintains that because his former counsel failed to submit the respondent's tax returns and documentary evidence regarding the respondent's father's health conditions, the respondent was denied cancellation of removal.[1]

"Due process challenges to deportation proceedings require a showing of prejudice to succeed." *Castillo-Perez v. I.N.S.*, 212 F.3d 518, 527 (9th Cir. 2000). "Prejudice is

[1] In his motion, the respondent references reopening to have his *asylum* claim heard. We presume this reference to asylum to be error, because the respondent failed to elaborate on any reason for reopening to have his asylum claim heard after he withdrew his application below (I.J. at 2; Tr. at 6-7).

found when the performance of counsel was so inadequate that it may have affected the outcome of the proceedings." *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir.1999) (quoting *Barraza Rivera v. INS,* 913 F.2d 1443, 1448 (9th Cir.1990)). The respondent here has not met this requirement. Specifically, we note that the record contains tax returns for the respondent, and he has not specified what other tax returns his former counsel allegedly failed to submit. Regarding his father's health concerns, the record reflects that testimony was provided regarding his father's health condition (Tr. at 24-26, 41-43), and the Immigration Judge took into consideration this factor (I.J. at 2, 7). The respondent has failed to proffer what documentary evidence his former counsel failed to submit regarding the respondent's father's health concerns. We find that the respondent has failed to establish that his former counsel's performance was so inadequate that it may have changed the outcome of the proceedings. Accordingly, the motion is denied.

/s/ Edward R. Grant
FOR THE BOARD

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE FRANCISCO MARTINEZ-CUADRA, Petitioner, v. JOHN ASHCROFT, Attorney General, Respondent.	No. 03-70124 Agency No. A75-250-682 MEMORANDUM* (Filed Jan. 16, 2004)

On Petition for Review of an Order of the Board of Immigration Appeals

Submitted January 12, 2004**

Before: BEEZER, HALL and SILVERMAN, Circuit Judges

Respondent's motion for summary disposition is granted because the questions raised by this petition for review are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard). Accordingly, this petition for review is denied. *See Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1124 (9th Cir. 2000) (stating

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

that an alien who argues ineffective assistance of counsel must exhaust administrative remedies by first presenting the issue to the BIA).

PETITION FOR REVIEW DENIED.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A75-250-682 – San Francisco Date: Dec. 9, 2002

In re: JOSE FRANCISCO *MARTINEZ-CUADRA*

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se[1]

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event

[1] We note that Miguel Gadda has been suspended from practice before the Board, the Immigration Judges, and the Immigration and Naturalization Service. As this attorney is not permitted to practice law before the Board at this time, this order is being sent directly to the respondent, and a copy is being sent to Miguel Gadda. Please also see the attached copy of the order suspending Miguel Gadda from practice.

the respondent fails to so depart, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the district director, the respondent shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ Paul W. Schmidh
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Francisco, California

File No.: A 75 250 682 October 28, 1998

In the Matter of	)	IN REMOVAL
JOSE FRANCISCO MARTINEZ-CUADRA	)	PROCEEDINGS
Respondent	)	

CHARGE: INA Section 212(a)(6)(A)(i).

APPLICATIONS: Cancellation of removal and voluntary departure.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Miguel D. Gadda, Esquire Law Office of Miguel Gadda 5258 Mission Street San Francisco, CA 94112	Richard C. Cunan, Esquire Asst. Dist. Counsel U.S. INS 550 Kearny Street, Suite 1000 San Francisco, CA 94180

ORAL DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

On October 15, 1996, the respondent filed an application for asylum with the Immigration and Naturalization Service. The Service did not grant the application and referred it to the Immigration Court and issued a Notice to Appear on August 14, 1997. It has been marked into the record as Exhibit 1. The Notice to Appear alleges that the respondent is subject to removal as an alien present in the United States without being admitted or paroled. It further alleges that the respondent last entered the

United States on or about March 15, 1978, at or near San Ysidro, California. At a hearing before this Court on September 2, 1997, respondent, through counsel, admitted the allegations in the Notice to Appear and designated Mexico as the country of removal. The application for asylum was withdrawn. The respondent was granted additional time to submit the application for cancellation of removal, which was submitted on February 12, 1998. It has been marked into the record as Exhibit 3. ~~An a~~[A]dditional ~~application~~ [documentation] in support of this application was submitted and has been marked into the record as Exhibit[s] 4 and 5. A hearing on the merits of the application for cancellation of removal was held today, October 28, 1998. On the basis of testimony, documentary evidence and arguments of counsel the following is the decision of this Court.

II. Statutory Eligibility

In order to establish statutory eligibility for relief under Section 240(A)(b) of the Immigration and Naturalization Act, an alien must prove that he~~'s~~ [has]. been physically present in the United States for a continuous period of 10 years immediately preceding the issuance of an Notice to Appear. He must also prove that he~~'s~~ [is] a person of good moral character and that he has not been convicted of a crime of moral turpitude, a controlled substance offense, an aggravated felony, a high speed flight from INS officials, or have a conviction for failing to register as a foreign agent or for visa fraud. Finally, an application for cancellation of removal must prove that his removal would result in exceptional and extremely unusual hardship to a qualifying relative[,] ~~In~~ [in] this case[,] to his lawful permanent resident father.

III. Facts

The respondent is a 39-year-old married native and citizen of Mexico, who first entered the United States in the late 70's and has departed the United States since his original entry. The respondent is the father of four Mexican children, whose ages are 14, 11, eight and three. Those children are now living in the United States having entered without inspection on October of 1996. The respondent's wife, [is] also 39-years-old, [and] entered the United States in October 1996. Respondent's father is 63-years-old and he~~'s~~ [is] a lawful permanent resident. The respondent's father is not employed. He is on permanent disability for which less than $500 a month in addition to the medical benefits that come with that form of relief.

The respondent[,] in the course of living in the United States[,] has been a seasonal agricultural worker and, according to the Social Security printout that he provided the Court, he has worked some part of every year since 1982. The record reflects zero earnings in 1981 when the respondent indicates that he did not come to the United States and it was the year of his marriage.

The respondent testified that since arriving in the United States in 1978 he was absent from the United States only on two occasions, which were six months apart. They were approximately February of 1980 and this exit would have been brief and the next exit was in August of 1980, from which he did not return until 1982. The relevant period in question is August of 1987 to the present. According to the respondent's testimony, he has not made a single departure during the relevant time period.

All of respondent's children were born in Mexico. The respondent was married in Mexico in 1981. His daughter

Claudia was born in early 1984. His daughter Marianna was born in November of 1987. His son Octavio was born in August of 1995. And his son Francisco was born in November of 1990. According to the respondent, his wife lived in Mexico and travelled to the United States to visit him. However, she did not ~~have~~ [give birth to] her children in the United States because he was not covered by medical insurance and the cost was too expensive so she returned to Mexico to have the children. There was some contradiction in the respondent's testimony regarding his wife's presence in the United States. He later testified that she lived primarily in Mexico and made visits here, but always returned and lived primarily in Mexico.

The respondent's father testified regarding hardship to himself and ~~with~~ [was] questions[ed] regarding the respondent's physical presence. His testimony contradicted his son's testimony in a number of ways. The respondent's father testified that the respondent was in Mexico for the birth of his two oldest daughters, which would have in January of 1984 and November of 1987. In addition, the respondent had testified that his father did not make visits to Mexico and had been separated from and did not see the respondent's mother for a long period of time. The respondent's father testified that he goes to Mexico one or two times a year for a period of two or more months, sometimes for short visits of two weeks and sometimes for up to two months. His testimohy contradicts the respnodent's as well as the testimony regarding the respondent's physical presence in the United States and in Mexico. The respondent declined to call his wife as a witness, although she was present in Court and was excluded at the beginning of the hearing as it was indicated that she would be a witness.

In light of the contradictions in the respondent's testimony regarding his own physical presence in the United States, his father's physical presence in the United States and his wife's physical presence in the United States, the Court cannot find that the respondent was physically present in the United States for the entire time period that he testified he was here. Because of the contradictions in testimony, and [that] the evidence in the record is ambiguous regarding his physical presence, the Court concludes that the respondent has perhaps exaggerated his physical presence in the United States in hopes of gaining the relief of cancellation of removal.

It does appear from the record that the respondent was in the United States some part of each of the year. However, his wife was apparently in Mexico the entire year and his family was in Mexico up until 1996. The respondent's version of events, which requires that his wife would have entered without inspection several times for short visits is implausible. And [it] is more likely that the respondent returned to Mexico several times, if not annually and for whatever reason has declined to indicate this for the Court.

Additional contradictions arose around the presence of respondent's father in the home of the respondent. At the beginning of the hearing the testimony began pre[o]c[e]eding on the assumption that the respondent was the father of a U.S. citizen child and that that would be the basis for proving exceptional and extreme and unusual hardship. This was indicated on form EOIR-42(b), Exhibit 3, and despite opportunities to make changes in the application, it was never removed until it was discovered in the course of testimony that the respondent in fact is not the parent of a U.S. citizen child. At that point the basis for relief

switched to hardship to the respondent's lawful permanent resident ~~child~~ father. On the application form EOIR-42(b), the respondent indicated that his lawful permanent resident father lived in Los Angeles. In testimony the respondent indicated that he visits Los Angeles occasionally where he has a daughter, but that he lives primarily with the respondent and that respondent is completely responsible for buying medicine, taking him to the doctor. However, in his father's testimony, the father, who is the qualifying relative, indicated that he went to the doctor in Lompoc, California, which is in Southern California, which makes the Court believe that the respondent's father's primary residence may be in Los Angeles and not in Salinas as ~~he's~~ [has] indicated in testimony.

IV. Credibility

Based on the noted contradictions and testimony of both the respondent and his witness, his lawful permanent resident father, the Court finds that it cannot give full evidentiary weight to either ~~of~~ the testimony of the father or the testimony of the respondent.

V. Analysis and Finding

Based on the noted contradictions in the evidence before this Court, the Court finds that the respondent has not met his burden of proving his 10 years of physical presence in the United States or that his father would suffer exceptional, extreme or unusual hardship if he were to return to Mexico. There does not appear to be any evidence that would impugn the respondent's moral character and the respondent appears to meet the requirements of good moral character in INA Section 101(f).

VI. Voluntary Departure

The respondent has requested the privilege of departing the United States voluntarily in lieu of removal under Section 240(B) of the Act. To qualify for voluntary departure, he must show that he is willing and has the means to depart and that he has been a person of good moral character for at least the past five years and that he deserves the relief in the exercise of discretion.

Discretionary consideration of an application for voluntary departures involves a weighing of factors including the respondent's prior immigration history, the length of his residence in the United States and the extent of his family, business and societal ties in the United States. In spite of the apparent contradictions ~~and~~ [in] testimony, which I have noted, the Court has not made a finding that the respondent has lied under oath, merely that the respondent has not met his burden of proving either his physical presence in the United States or his father's exceptional, [and] extreme[ly] ~~or~~ unusual hardship.

I find that the respondent has met the statutory requirements for voluntary departure. There is evidence in the record that he would obey the Court's order and has the means to depart the United States. The relief of voluntary departure will be granted in the exercise of discretion for a period of 60 days[,] with a bond of $500.

ORDER

IT IS HEREBY ORDERED that the respondent's application for cancellation of removal be denied.

IT IS FURTHER ORDERED that the respondent be granted the privilege of departing this country voluntarily without expense to the Government on or before December 28, 1998, plus [any] extension and on such conditions that may be granted by the District Director of the Immigration and naturalization Service. The respondent must post a bond of $500.

IT IS FURTHER ORDERED that if the respondent does not voluntarily depart the United States when and as required, the privilege of voluntary departure shall be withdrawn without further notice or[f] proceedings and the respondent shall be removed from the United States to Mexico on the charges contained in the Notice to Appear.

/s/ Laura L. Ramirez
LAURA L. RAMIREZ
Immigration Judge

Section 101(a)(3)

[8 U.S.C. § 1101(a)(3)]

(3) The term "alien" means –

(A) Any person not a citizen or national of the United States.

Section 101(a)(42)(A) of the Immigration and Nationality Act

[8 U.S.C. § 1101(a)(42)(A)]

(42) The term "refugee" means –

(A) Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or

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Section 208(B)(1) of the Immigration and Nationality Act

[8 U.S.C. § 1158(b)(1)]

(B) Conditions for Granting Asylum

(1) In general –

The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements

and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

Section 240 (A)(b) of the Immigration and Nationality Act

[8 U.S.C. § 1229(b)]

(B) Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents. –

(1) In general – The Attorney may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien –

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) (except in a case described in section 237(a)(7) where the Attorney General exercises discretion to grant waiver); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Section 240 (B) of the Immigration and Nationality Act

[8 U.S.C. 1229c]

(B) Voluntary Departure

(1) In general – The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 240 or prior to the completion of such proceedings, if the alien is not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4)(B).